

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Rieth-Riley Construction Co., Inc.

Employer

and

Rayalan A. Kent

Case 07-RD-257830

Case 07-RD-264330

Petitioner

Local 324, International Union of Operating
Engineers (IUOE), AFL-CIO

Union

**LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-
CIO's MOTION TO THE BOARD TO REOPEN RECORD AND BRIEF IN SUPPORT
THEREOF**

Local 324, International Union of Operating Engineers, (IUOE), AFL-CIO, (Union) submits the following motion and brief in support thereof to reopen the record to receive newly discovered evidence that relates to the issues in Regional Director's Decision and Order and Supplemental Decision and Order dated November 9, 2020 in the above cases, upon which the Board has granted review.

The chronology of events from the Union's perspective is set forth in the Union's opposition

to the Requests for Review filed by Rieth Riley Construction Co., Inc. (Rieth-Riley) and the decertification petitioner.

Newly Discovered Evidence of Unfair Labor Practices

As set forth by the Regional Director in her Decision and Order and Supplemental Decision and Order dated November 9, 2020 unfair labor practice allegations are currently being litigated in Case 07-CA-234085 which include 1) a lockout in September 2018 of more than three weeks of approximately 130 employees of Rieth-Riley which occurred in the context of a multi-employer lockout in furtherance of multi-employer bargaining after the timely withdrawal from multi-employer bargaining by the Union; 2) unilateral deduction of monies from employee paychecks beginning in about October 2018 without bargaining with the Union; and 3) a unilateral grant of a wage increase to employees in July 2018 without notice to or bargaining with the Union, consistent with a multi-employer offer made by the multi-employer group after the Union's timely withdrawal from multi-employer bargaining. (Decision and Order, page 2)

There have been 11 days of trial in Case 07-CA-234085, beginning in October 2019. Certain scheduled dates for trial have been postponed because of various Covid-19 related issues of participants.

At the recent hearing on February 18, 2021 the Union and Acting General Counsel first learned that in addition to the Complaint allegation in Case 07-CA-234085 that Respondent Rieth-Riley gave a \$2 an hour raise to unit employees in July 2018, consistent with its multi-employer offer, it thereafter gave additional yearly increases to Unit employees without notice to or bargaining with the Union.

Keith Rose, President and CEO of Respondent Rieth-Riley, testified that he gave yearly

across-the-board raises to Unit employees, consistent with the multi-employer offer made by Michigan Infrastructure and Transportation Association (MITA), on behalf of the multi-employer bargaining group on May 18, 2018. (Exhibit 1, attached hereto, is the complete testimony of Keith Rose on February 18, 2021) Rose testified that the initial multi-employer offer made by MITA in 2018 proposed successive yearly raises over a five year period for a total of \$8 an hour; \$2 an hour for the first three years and \$1 an hour for the fourth and fifth years (Exhibit 1, Transcript 1631-33; Exhibit 2, Company Exhibit 32 in Case 07-CA-234085, Page 4).

The original Complaint in Case 07-CA-234085 alleged that Respondent unilaterally granted Unit employees a \$2 an hour raise in July 2018. Not until February 18, 2021 was the Union or the Acting General Counsel aware that Rieth-Riley had continued to grant yearly raises to Unit employees, in June 2019 and June 2020, consistent with the multi-employer offer made in May 2018. Keith Rose, President and CEO of Rieth-Riley, conceded that it had not notified or bargained with the Union over the second and third raise. (Exhibit 1, Transcript 1633-34)

Counsel for the Acting General Counsel has indicated his intention to move to amend the Complaint in Case 07-CA-234085 to allege that additional yearly pay raises on June 1, 2019 and June 1, 2020 violate the Act. (Exhibit 3).

Analysis

The Union urges the Board to reopen the record for the purpose of receiving the evidence attached. The uninterrupted continuation of the illegal pay raises is a material factor that dramatically fortifies the reasoning and conclusions of the Regional Director in finding that no question concerning representation exists in the above cases. These facts lend support to every argument made by the Regional Director in her thoughtful decisions to dismiss. Further, these facts

concomitantly undermine arguments made by Rieth-Riley and the decertification petitioner in opposition to her decision.

The Regional Director initially concluded that there was no question concerning representation based on her analysis of the causal link between the allegations of Respondent's unfair labor practices and employee disaffection from the Union.

Specifically, the Regional Director set forth the Master Slack Corp. criteria which led her to conclude that no question concerning representation could be raised. The analysis of each Master Slack criterion is enhanced by the evidence sought to be introduced herein.

In her decision the Regional Director evaluated the temporal proximity between the unfair labor practices and the filing of the petitions. While the Regional Director acknowledged in her decision that the allegations of unfair labor practices then known occurred in 2018 and the filing of the petitions occurred in 2020, she found that the unfair labor practices led to events that continued to have an impact upon employees, and led to employee disaffection from the Union. The evidence sought to be introduced herein demonstrates Rieth-Riley's uninterrupted continuation of granting wage increases to Unit employees in 2019 and 2020 without notice to or bargaining with the Union, further demonstrating Respondent's unrepentant undermining of the status of the Union's role as exclusive bargaining representative at times closer to the filing of the petitions. It is a provocative defiant ongoing yearly demonstration by the Respondent of the powerlessness of the Union in violation of the Act. The attached evidence illustrates not only closer temporal proximity, but Respondent's simultaneous ongoing pattern of serious unfair labor practice violations at the time of the petitions.

The second Master Slack criterion, the nature of the employer's unlawful actions is also

enhanced by the evidence sought to be introduced herein. Even when there was only one \$2 an hour unilateral raise granted by Respondent, the Regional Director rightly concluded that a single wage increase was of a kind that the Board concludes can have a “lasting and pervasive effect on employees,” in addition to the other alleged unfair labor practices. (Decision and Order, p 6) Such employer actions undermine the Union’s authority and are the type of conduct designed to invite employee unrest and cause disaffection from the Union, (Decision and Order, p 6)

As in Guerdon Industries Inc., cited by the Regional Director, violations of this type are of the most serious a Union faces and affect every member of the bargaining unit: even the single across- the-board wage rate originally alleged:

graphically portrayed to the employees that Respondent was in a position to confer or withdraw economic benefits without regard to the presence of the Union. Such a failure by Respondent to accord to the Union its rightful role to negotiate such programs for the employees necessarily tended to undermine the Union's authority among the employees, whose interest it was obligated to represent in such matters, with erosion of majority status the probable result.

218 NLRB 658, 661-62 (1975).

Today, on the basis of the evidence proposed to be received herein, the Regional Director’s reasoning is reinforced exponentially by Respondent’s unrepentant yearly pattern of granting of substantial raises without regard to the rightful role of the Union, consistent with its unabating implementation of its multi-employer offer. The Regional Director’s analysis of the second Master Slack criterion is strengthened by the fact as demonstrated by the newly discovered evidence that Respondent’s repudiation of the Union’s role in bargaining continued unremittingly.

Similarly, the third and fourth Master Slack criteria as analyzed by the Regional Director relating to the tendency of the unfair labor practices to cause disaffection and the effect on employee

morale are similarly fortified by the evidence sought to be introduced. The effect of one \$2 an hour pay raise is substantial. The effect of repeated yearly wage increases of \$2 for each of three years without notice to or bargaining with the Union has an exponential effect on employee disaffection and morale and constitutes a complete repudiation of any role for the Union as the exclusive collective bargaining representative of employees. This ongoing pattern of unfair labor practices affecting the vulnerable area of employee compensation clearly communicates the message that Rieth-Riley, not the Union, controls the livelihood of its employees, and will do so pursuant to its personal whims without regard to the Union's rightful role as exclusive collective bargaining representative.

The Union urges the Board to reopen the record to receive the evidence attached hereto and to uphold the Regional Director's dismissal of the petitions on the basis of her decision that no question concerning representation could be raised at the time the petitions were filed, as supplemented by the impact of the newly discovered evidence.

The Board may grant a motion to reopen the record when a party presents newly discovered evidence that relates to material issues in dispute where the motion is made promptly upon discovery. The undersigned first became aware of the evidence at issue on February 18, 2021 and has filed this motion within two days of receipt of the transcript herein, which was transmitted by Veritext, the court reporter on March 2, 2021. (Exhibit 4) See Michigan State Employees Association, 364 NLRB No 65, fn 2 (2016) (motion to reopen record on unfair labor practice proceeding).

Respectfully submitted this 4th day of March, 2021.

Dated: March 4, 2021

By:



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CERTIFICATE OF SERVICE

AMY BACHELDER, being first duly sworn, deposes and says that on the 4th day of March 2021, she served a copy of Local 324, International Union of Operating Engineers (IUOE), AFL-CIO's Motion to the Board to Reopen Record and Brief in Support Thereof upon the following via email:

Alex Preller, Esq.:

Via email: alex.preller@faegredrinker.com

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Via email: terry.morgan@nrlb.gov

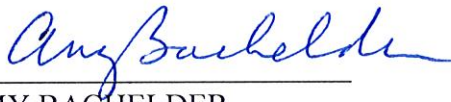
Elizabeth Kerwin, Assistant

Via email: elizabeth.kerwin@nrlb.gov

Regional Director:

Dated: March 4, 2021

By:



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